

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

SEAN HOLBROOK,

Plaintiff,

v.

CV 07-1100 WPL/ACT

SAMUEL JAMES GAVITO and
GAVITO TRUCKING INC.,

Defendants.

ORDER

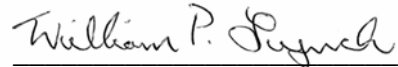
At the Pretrial Conference held on January 11, 2010 Plaintiff disclosed that he intended to call Jeff Vick to rebut the testimony of Defendants' liability expert, Matthew Mecham. When Defendants objected, I requested briefing on this issue. I have now considered those briefs (Doc. 124, 125, 127) and will deny Plaintiff's request.

Plaintiff concedes that Vick did not prepare a written report as required by Federal Rule of Civil Procedure 26(a)(2)(C)(ii). Plaintiff's failure to comply with this rule is not substantially justified or harmless. Defendants will be prejudiced or surprised by Vick's testimony absent receipt of his report, because trial begins next week it is too late to cure the prejudice, and this case has been continued once already at Plaintiff's request. *See Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 953 (10th Cir. 2002). Even assuming that Plaintiff acted in good faith in not requesting a report from Vick, good faith alone is not sufficient to support a finding of substantial justification for, or harmlessness of, a Rule 26(a) violation. *See id.* at 954.

While “the exclusion of evidence is a harsh penalty and should be used sparingly,” it is appropriate under the circumstances. *See Wegener v. Johnson*, 527 F.3d 687, 692 (8th Cir. 2008).

Plaintiff’s request to call Vick as a rebuttal witness is denied.

IT IS SO ORDERED.

A handwritten signature in cursive script, reading "William P. Lynch", is written over a horizontal line.

WILLIAM P. LYNCH
UNITED STATES MAGISTRATE JUDGE

A true copy of this order was served on the date of entry--via mail or electronic means--to counsel of record and any *pro se* party as they are shown on the Court’s docket.